

College of William & Mary Law School William & Mary Law School Scholarship Repository

Library Staff Publications

The Wolf Law Library

2011

Splitting Hairs: What Subtle Distinctions Teach Us About Authority

Benjamin J. Keele

benjamin.j.keele@gmail.com

Repository Citation

Keele, Benjamin J., "Splitting Hairs: What Subtle Distinctions Teach Us About Authority" (2011). *Library Staff Publications*. Paper 34.
<http://scholarship.law.wm.edu/libpubs/34>

Copyright c 2011 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<http://scholarship.law.wm.edu/libpubs>



Splitting HAIRS

WHAT SUBTLE DISTINCTIONS TEACH US ABOUT AUTHORITY

By Benjamin J. Keele

Legal researchers constantly deal with issues of authority. Did the police have authority to search the car? Is this court of appeals decision binding authority on my case? What statutes are authoritative in my jurisdiction? These questions are important, and librarians often help find answers. The question of authority that librarians are best equipped to answer, however, is “How authoritative is this source?”

In addition to helping students and public patrons find the sources that contain answers to their questions, academic and public law librarians teach researchers how to evaluate whether a source is indeed what it claims to be. We teach students that decisions of the supreme court override those of a court of appeals (except in New York, where the opposite is true). We tell researchers that a provision of the *U.S. Code* is more authoritative than an inconsistent provision of the *Code of Federal Regulations*. And *Nimmer on Copyright* is a better authority than a newspaper article.

it was designated by the judges for publication. The distinction between precedential and non-precedential (or published and unpublished) opinions shows that what counts as legal authority is limited by other legal rules.

For most researchers, precedential and non-precedential opinions are now equally accessible. Opinions marked as precedential by judges are published in West reporters, but non-precedential opinions are also published in major legal databases and on court websites. Further highlighting the anachronism of dubbing an opinion unpublished is that some non-precedential opinions are

Positive versus Prima Facie Law (Errors Can Occur in Sources)

Non-precedential opinions are easy to spot due to the notices and their exclusion from reporters of precedential opinions. Distinguishing between positive and prima facie law is more difficult. The clearest markings of positive and prima facie laws are not where most researchers would think to look—on the front matter of the printed volumes of the *Statutes at Large* and in the table of contents of the *U.S. Code*, where asterisks are placed next to titles enacted as positive law.

The *Statutes at Large* are positive law—whatever text is in those volumes is the law. When Congress makes a mistake or a typographical error creeps into the *Statutes at Large*, Congress can only fix it by enacting a law that corrects the error. Much of the *U.S. Code* is prima facie law, which means the text in the *U.S. Code* is presumed to be the law, but it can be trumped by any inconsistent text that may exist in the *Statutes at Large*. Some titles of the *U.S. Code* have been enacted as positive law, so for those titles no recourse can be made to the *Statutes at Large*.

The compilers in the Office of the Law Revision Counsel generally do a very good job of codifying the *Statutes at Large* into the *U.S. Code*, so most of the time there is no effective difference between the session laws and code. However, in the years since the first *U.S. Code* was published in 1926, errors have been found that were material to actual cases. Mary Whisner recounts several of these cases and notes that hundreds of errors were found in the draft codifications leading up to the publication of the *U.S. Code* in her Fall 2009 *Law Library Journal* “Practicing Reference” column, “The *United States Code*, Prima Facie Evidence, and Positive Law.”

Some legislators insisted that the *U.S. Code* be prima facie evidence of the law because they knew that errors in important legal materials were inevitable. Better technology has certainly reduced the incidence of errors, but mistakes have been found in major legal databases, too. Librarians don't need to teach the difference between prima facie and positive law when introducing session laws and statutory codes, but we should teach the underlying point that no source is immune to mistakes.

We should instill a healthy level of caution and an understanding that relying on a source involves a certain, even if miniscule, level of risk. In most circumstances, looking at a reliable and well-maintained code, official or unofficial, will suffice. Hanging a legal

The question of authority that librarians are best equipped to answer, however, is “How authoritative is this source?”

Beyond these broad and simple statements, though, lie more subtle distinctions of authority less frequently encountered but nonetheless important for many researchers. This article discusses three such distinctions: precedential versus non-precedential opinions, positive versus prima facie law, and professor-written versus student-written law journal articles.

Other examples surely exist, and while some patrons may think such distinctions are needless nit-picking, there are times when such questions of authority will affect their research. Librarians do not need to drill students and patrons with charts listing every miniscule ranking of authority, but we do a disservice to our patrons by not mentioning these distinctions when relevant.

Each of these examples also illustrates a general principle of evaluating legal sources' authority that we should teach our patrons. Just as law professors teach students to spot the right issues in a legal problem, we should instruct researchers to ask the right questions to decide how authoritative a source is and whether it can answer their questions.

Precedential versus Non-precedential Court Opinions (Authority is Limited by Rules)

Some distinctions of legal authority are pretty intuitive. The laws in Nevada have very little effect in Indiana, for example. Likewise, a decision of the Nevada Supreme Court is unlikely to have any authority in an Indiana court. Less intuitive, though, is that whether an Indiana Court of Appeals decision can be cited as authority depends on whether

published in the *Federal Appendix*, a print reporter.

If there is no difference in access, whether an opinion can be cited as authority depends solely on the court's rules. Federal Rule of Appellate Procedure (FRAP) 32.1 provides that all opinions issued after January 1, 2007, can be cited; before that, one must look to circuit and local court rules. (For more background on FRAP 32.1, see Amy E. Sloan's article, “If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts,” in the Volume 86, Number 4 issue of *Nebraska Law Review*.) State courts are also divided on the citation of non-precedential opinions.

Researchers looking for controlling precedents need to understand that just as an on-point (or even a close to on-point) high court decision is virtually always better than on-point intermediate or trial court decisions, so are precedential opinions preferable to non-precedential opinions. Experienced attorneys generally know this, but students and lay researchers may need to be alerted to the distinction before they rely upon a case that is less authoritative than they think.

Fortunately, most non-precedential opinions are easily identified by the prominent notices on the documents. Simply instructing researchers to prefer decisions without such notices will help avoid confusion and disappointment. More generally, though, librarians should teach researchers that different legal systems permit different kinds of authority. If a researcher remembers to ask what authorities are permitted in a given case, many fruitless research paths will be avoided.

argument on a code provision quoted in a book or article is a riskier proposition, and if one's key argument depends on the precise wording of a clause, then checking the positive law copy is worthwhile.

Researchers don't need to insist on a certified copy of every statute, but they do need to know every copy of a law they find is not equally accurate, and they should seek to use the most trustworthy copy they can reasonably obtain. Awareness of the risk of errors in legal documents will lead researchers to seek well-maintained copies of legal documents, like judicial opinions, administrative regulations, and international agreements. Librarians are prepared to meet this demand by directing researchers to official or unofficial but reputable print codes, government websites like FDSys (fdsys.gov), or well-known private websites like the Legal Information Institute (law.cornell.edu).

to the education and experience of the author. Of course, an excellent indicator of authority is solid legal analysis and evidence. Experienced researchers in familiar territory will know this when they see it, but researchers new to legal research or striking out into a new field will need signs of authority that do not presuppose a solid grounding in the relevant literature.

A few names have become highly authoritative brands (such as Nimmer for copyright or LaFare for criminal procedure), but these are rare, so librarians need to teach researchers to look for indicators of authority in secondary sources. In addition to the author's credentials, another sign of an article's authority is citation by courts or other scholars. This can be discovered through major legal databases or Google Scholar.

If a researcher is thinking of citing a secondary source as authority, seeing that others have already done so is a good sign. Citation metrics have their own

or professional-written and student-written articles. The principles that underlie these distinctions—legal rules affect what counts as authority, errors can occur in any source, and the author's identity matters—will help researchers choose good sources for any project.

Much legal instruction occurs when answering a reference query. When answering a question, a librarian can thread these principles into her description of the relevant source and her explanation of why the source is likely to be helpful. The distinction between precedential and non-precedential opinions need only be brought up if the researcher states she has found the answer and presents a non-precedential opinion. Then it would be appropriate to suggest checking the relevant court rules on citing non-precedential opinions and perhaps a bit more digging for a precedential opinion with a similar holding.

The proper time and extent of instruction on appraising authority will depend on the researcher's knowledge, research goal, and access to legal materials. What is best for experienced attorneys will be different from what is best for students. The same is true for laypersons. All researchers, though, have a common need to access and recognize authoritative sources. Librarians can meet this need by explaining these principles when recommending sources or reviewing materials the researcher has already found.

.....
We should instill a healthy level of caution and an understanding that relying on a source involves a certain, even if miniscule, level of risk.
.....

Professor-written versus Student-written Articles (Who Made the Source Matters)

When considering the authority of different copies of primary legal sources, the more closely a copy matches the current text of the original legal document, the more authoritative it is. For secondary sources, authority is determined largely by the educational and professional credentials of the authors.

In the genre of academic law journal articles, writings by legal scholars and practitioners are generally regarded as more authoritative than pieces written by law students. The differences of authority between scholar-written and student-written articles are murky; courts have cited articles by both professionals and students. Student-written work is often not clearly labeled as such, and novice researchers may not know that notes, comments, and unsigned writings are generally by student authors.

Regardless of the formal labeling of an article, a good way for researchers to evaluate an article's authority is to look

weaknesses, as does depending solely on the imprimatur of an established publisher. No one of these proxies for authority will serve on its own, but taking a few together will get researchers closer to authoritative secondary sources and help them recognize authoritative works when they come across them.

The same principles apply for online secondary sources. Much legal commentary now is published exclusively online in blogs, online supplements to print journals, and solely digital journals. For many researchers, print still carries a greater air of authority, but plenty of online sources are perfectly authoritative. Librarians should remind researchers to check for indicators that the author knows what she is talking about, regardless of the source's format.

Conclusion

Looking for answers to legal questions often requires sifting through a variety of sources, some more authoritative than others. Not all researchers need to know about the differences between precedential and non-precedential opinions, positive and *prima facie* law,

.....
Librarians should remind researchers to check for indicators that the author knows what she is talking about, regardless of the source's format.
.....

The distinctions of authority we find might seem like splitting hairs to students and public patrons, but as long as they are grounded in solid principles for selecting the most authoritative source available, we will help researchers find sources that best fit their needs. ■

Benjamin J. Keele (bjkeele@wm.edu) is a reference librarian at William & Mary School of Law in Williamsburg, Virginia.